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Lloyd S. Elkins Jr.

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## Domestic Relations—Illegitimates—Father's Duty to Support

In the recent North Carolina case of *Allen v. Hunnicutt*<sup>1</sup> it was held, in effect, that an illegitimate child may not compel its father to furnish it support by means of a civil action, but that only by the procedure outlined in the "bastardy" statute<sup>2</sup> may the child enforce "such rights as it may have"<sup>3</sup> against the putative father.

The direct question presented in *Allen v. Hunnicutt* has rarely confronted the courts. In Alabama and Virginia it has been ruled that without express statutory authorization an illegitimate may not maintain a civil suit for support against its putative father.<sup>4</sup> But in Kansas the common law rule which denies that the father has any duty to support his illegitimate child has been changed, the bastardy statute held to provide an inadequate remedy, and a civil action by the child permitted.<sup>5</sup>

The problem has often received the indirect consideration of the courts, and the frequent reassertion of the common law rule doubtless explains the infrequency of cases contesting the possibility of a civil suit by the child. Cases abound commenting that the father has no duty to support his illegitimate children except as provided by statute,<sup>6</sup> that such statutes are to be strictly construed,<sup>7</sup> and that the rights and remedies they provide are exclusive.<sup>8</sup>

In North Carolina the disparity between legitimate and illegitimate children with respect to support and maintenance is striking. The

<sup>1</sup> 230 N. C. 49, 52 S. E. 2d 18 (1949).

<sup>2</sup> N. C. GEN. STAT. §§49-1 through 49-4 (1943). The term "bastardy" statute is misleading, bastardy being the mere begetting of an illegitimate child. Bastardy alone is no crime in North Carolina; there must be in addition willful non-support of the child. *State v. Bowser*, 230 N. C. 330, 53 S. E. 2d 282 (1949); *State v. Stiles*, 228 N. C. 137, 44 S. E. 2d 728 (1947).

<sup>3</sup> In the absence of contract, the child's only right to support from its putative father is that created by the bastardy statute. See discussion, post.

<sup>4</sup> *Simmons v. Bull*, 21 Ala. 501, 56 Am. Dec. 257 (1852); *Brown v. Brown*, 183 Va. 353, 32 S. E. 2d 79 (1944).

<sup>5</sup> *Doughty v. Engler*, 112 Kan. 583, 211 Pac. 619 (1923); amplified in *Myers v. Anderson*, 145 Kan. 775, 67 P. 2d 542 (1937).

<sup>6</sup> *Albanese v. Richter*, 67 F. Supp. 771 (S. D. N. J. 1946); *Law v. State*, 238 Ala. 428, 191 So. 803 (1939); *Myers v. Harrington*, 70 Cal. App. 680, 234 Pac. 412 (1925); *Washington v. Martin*, 75 Ga. App. 466, 43 S. E. 2d 590 (1947); *State v. Lindskog*, 175 Minn. 533, 221 N. W. 911 (1928); *State v. Porterfield*, 222 Mo. App. 553, 292 S. W. 85 (1927); *Carlson v. Bartels*, 143 Neb. 680, 10 N. W. 2d 671 (1943); *Wynder v. Daniels*, 72 N. Y. S. 2d 314 (1947); *State v. Zimmerman*, 67 Ohio App. 272, 36 N. E. 2d 808 (1941); *State v. Boston*, 69 Okla. Crim. 307, 102 P. 2d 889 (1940); *Kordoski v. Belanger*, 52 R. I. 268, 160 Atl. 205 (1932); *Beaver v. State*, 96 Tex. Crim. 179, 256 S. W. 929 (1923); *Brown v. Brown*, 183 Va. 353, 32 S. E. 2d 79 (1944). For collection of cases prior to 1923, see Note, 30 A. L. R. 1069 (1924).

<sup>7</sup> *Albanese v. Richter*; *Washington v. Martin*; *State v. Lindskog*; *Wynder v. Daniels*; *State v. Zimmerman*; *supra* note 6. For collection of cases prior to 1923, see Note, 30 A. L. R. 1069 (1924).

<sup>8</sup> *State v. Lindskog*; *Wynder v. Daniels*; *State v. Boston*; *Brown v. Brown*; *supra* note 7. For collection of cases prior to 1923, see Note, 30 A. L. R. 1069 (1924).

father is charged with primary liability for the support of his legitimate children,<sup>9</sup> whether or not they have property,<sup>10</sup> and the duty is said to exist until the child reaches twenty-one, at least,<sup>11</sup> unless there has been a complete emancipation by mutual assent.<sup>12</sup> His liability is not affected by divorce, even though the mother is awarded custody.<sup>13</sup> The duty may be enforced in a civil suit brought by the mother<sup>14</sup> or by the child,<sup>15</sup> or by motion in the cause by a divorced wife;<sup>16</sup> and criminal penalties are provided for its breach.<sup>17</sup> On the other hand, in the absence of contract<sup>18</sup> the illegitimate child's only right to support from its father is that created by the bastardy statute.<sup>19</sup> The only means for enforcing this right is by criminal prosecution,<sup>20</sup> which may be instituted by the mother or her representative, or the superintendent of public welfare (if the child is likely to become a public charge), but apparently not by the child itself.<sup>21</sup> The father's duty terminates when the child reaches fourteen, and may terminate when it reaches three.<sup>22</sup> In the litigation, the child is seriously handicapped. Every element—paternity, non-support, and willfulness—must be proved beyond a reasonable doubt,<sup>23</sup> and the right to appeal is denied except as granted to the state in other criminal cases.<sup>24</sup>

At early English common law, the illegitimate was a stranger to its

<sup>9</sup> *Wells v. Wells*, 227 N. C. 614, 44 S. E. 2d 31 (1947); Note, 26 N. C. L. REV. 202 (1948).

<sup>10</sup> *Burke v. Turner*, 85 N. C. 500, 504 (1881); *Haglar v. McCombs*, 66 N. C. 346, 351 (1872); *Walker v. Crowder*, 37 N. C. 478, 487 (1843).

<sup>11</sup> *Wells v. Wells*, 227 N. C. 614, 44 S. E. 2d 31 (1947).

<sup>12</sup> *Honycutt v. Thompson*, 159 N. C. 29, 74 S. E. 628 (1912). For what constitutes mutual assent, see *James v. James*, 226 N. C. 399, 38 S. E. 2d 168 (1946). Mutual assent is not required if the child marries or enlists in the armed services, the new relationship being inconsistent with the continuance of the parent-child relationship.

<sup>13</sup> *Green v. Green*, 210 N. C. 147, 185 S. E. 651 (1936); *Sanders v. Sanders*, 167 N. C. 319, 83 S. E. 490 (1914).

<sup>14</sup> *Wells v. Wells*, 227 N. C. 614, 44 S. E. 2d 31 (1947).

<sup>15</sup> *Green v. Green*, 210 N. C. 147, 185 S. E. 651 (1936).

<sup>16</sup> *Winfield v. Winfield*, 228 N. C. 256, 45 S. E. 2d 259 (1947).

<sup>17</sup> N. C. GEN. STAT. §14-322 (1943), as amended by N. C. Sess. Laws 1949, c. 810; N. C. GEN. STAT. §14-325 (1943).

<sup>18</sup> Regarding the father's contract to support his illegitimate child, see *Conley v. Cabe*, 198 N. C. 298, 151 S. E. 645 (1930); *Redmon v. Roberts*, 198 N. C. 161, 150 S. E. 881 (1929); *Thayer v. Thayer*, 189 N. C. 502, 127 S. E. 553 (1925).

<sup>19</sup> *Allen v. Hunnicutt*, 230 N. C. 49, 52 S. E. 2d 18 (1949). And even this right was created incidentally, said the court, the purpose of the statute being to prevent illegitimates from becoming public charges.

<sup>20</sup> *Allen v. Hunnicutt*, *supra* note 19.

<sup>21</sup> N. C. GEN. STAT. §49-5 (1943) seems to be exclusive, but the point has not yet been decided by the North Carolina Supreme Court.

<sup>22</sup> N. C. GEN. STAT. §49-4 (1943), as revised by N. C. Sess. Laws 1945, c. 1053.

<sup>23</sup> *State v. Ellison*, 230 N. C. 59, 52 S. E. 2d 9 (1949); *State v. Spillman*, 210 N. C. 271, 186 S. E. 322 (1936); *State v. Cook*, 207 N. C. 261, 176 S. E. 757 (1934).

<sup>24</sup> *State v. Morris*, 208 N. C. 44, 179 S. E. 19 (1935).

parents, neither owing it any duty of support.<sup>25</sup> In most jurisdictions today the courts have imposed a non-statutory duty upon the mother.<sup>26</sup> But the common law rule as to the father has been altered by judicial action in only one state.<sup>27</sup>

To mitigate the harshness of the common law, legislation has been enacted in almost every state, affording various means of compelling the father to contribute to the support of his illegitimate child. A great many states have adopted bastardy laws somewhat similar to those in North Carolina.<sup>28</sup> The action is usually civil in nature, though brought in the name of the state, and usually is instituted by the mother, or by the public authorities. Trial by jury is almost universal, and the mother is always a competent witness. North Carolina seems to be unique in making willful non-support an essential element; in other states the only issue is the question of paternity. The consequence of "conviction" is an order to support the child, enforceable by imprisonment, contempt proceedings, and attachment levied under execution. Often provision is made for release from prison after taking the pauper's oath.

Eight states have adopted variously modified versions of the Uniform Illegitimacy Act.<sup>29</sup> This act in detail imposes upon both parents

<sup>25</sup> *Murrell v. Industrial Commission*, 291 Ill. 334, 126 N. E. 189 (1920); *Doughty v. Engler*, 112 Kan. 583, 211 Pac. 619 (1923); *State v. Tieman*, 32 Wash. 294, 73 Pac. 375 (1903). A few cases have indicated an opinion that at common law the mother has always had the responsibility of maintaining her child. *State v. Porterfield*, 222 Mo. App. 553, 292 S. W. 85 (1927).

<sup>26</sup> *Davis v. Herrington*, 53 Ark. 5, 13 S. W. 215 (1890); *Beckett v. State*, 5 Ind. App. 136, 30 N. E. 536 (1892); *State v. Porterfield*, *supra* note 25; *Jaffe v. Deckard*, 261 S. W. 390, 397 (Tex. Civ. App. 1924). It has been held, however, that in the absence of statute neither parent has the duty of support. *Murrell v. Industrial Commission*, *supra* note 25.

<sup>27</sup> *Doughty v. Engler*, 112 Kan. 583, 211 Pac. 619 (1923). In *Barrett v. Barrett*, 44 Ariz. 509, 39 P. 2d 621 (1934) the court used language suggesting that had not the legislature already legitimized all children, it might have followed *Doughty v. Engler* and changed the common law in Arizona.

<sup>28</sup> ALA. CODE ANN. tit. 6, §§1 *et seq.* (1940); ARK. STAT. ANN. §§34-701 *et seq.* (1947); COLO. STAT. ANN. c. 20, §§1 *et seq.*, c. 83, §§1 *et seq.* (1935); CONN. REV. GEN. STAT. §§8178 *et seq.* (1949); DEL. REV. CODE §§3558 *et seq.* (1935); FLA. STAT. ANN. §§742.01 *et seq.* (1944); GA. CODE ANN. §§74-301 *et seq.* (1935); ILL. ANN. STAT. c. 17, §§1 *et seq.* (1934); KAN. GEN. STAT. ANN. §§62-2301 *et seq.* (1935); KY. REV. STAT. §§406-010 *et seq.* (1948); ME. REV. STAT. c. 153, §§23 *et seq.* (1944); MD. ANN. CODE GEN. LAWS art. 12, §§1 *et seq.* (1939); MASS. GEN. LAWS c. 273, §§11 *et seq.* (1932); MICH. STAT. ANN. §§25.451 *et seq.* (Henderson 1937); MINN. STAT. §§257.18 *et seq.* (Henderson 1945); MISS. CODE ANN. §§383 *et seq.* (1942); MONT. REV. CODE ANN. §§12267 *et seq.* (1935); N. H. REV. LAWS c. 128, §§1 *et seq.* (1942); OHIO GEN. CODE ANN. §§12110 *et seq.* (1938); OKLA. STAT. ANN. tit. 10, §§71 *et seq.* (1936); ORE. COMP. LAWS ANN. §§28-901 *et seq.* (1940); PA. STAT. ANN. tit. 18, §4732 (1945); R. I. GEN. LAWS c. 424, §§1 *et seq.* (1938); S. C. CODE ANN. §§1726 *et seq.* (1942); TENN. CODE ANN. §11936 (Williams 1934); UTAH CODE ANN. §§14-2-1 *et seq.* (1943); VT. STAT. §§3265 *et seq.* (1947); WASH. REV. STAT. ANN. §§1970 *et seq.* (1931); W. VA. CODE ANN. §§4770 *et seq.* (1943); WIS. STAT. §§166.01 *et seq.* (1947).

<sup>29</sup> IND. ANN. STAT. §§3-623 *et seq.* (Burns 1933); IOWA CODE §§675.1 *et seq.* (1949); NEV. COMP. LAWS ANN. §§3405 *et seq.* (1929); N. M. STAT. ANN. §§25-401 *et seq.* (1941); N. Y. DOM. REL. LAW §§119 *et seq.* (1941); N. D. REV. CODE §§32-3601 *et seq.* (1943); S. D. CODE §§37.2101 *et seq.* (1939); WYO. COMP. STAT. ANN. §§58-401 *et seq.* (1945).

the duty to support their illegitimate children, enabling the mother or third parties to maintain a civil action against the putative father to force him to contribute to support, or to recover for support furnished. Liability is extended to the father's estate under certain conditions. The act contains full and effective means for enforcing the father's duty, and is well adapted to meet the problem of the absconding father.

Broad statutory duties are imposed in California and New Jersey.<sup>30</sup> In Louisiana the statute says that fathers owe "alimony" to their illegitimate children "when they are in need."<sup>31</sup> In Nebraska the father has the same duty as if the children were legitimate, after paternity has been judicially established.<sup>32</sup> And in Arizona every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock.<sup>33</sup>

Modern conceptions of social obligations are far advanced from those in the days when the common law was formulated. A re-examination of the basic considerations underlying the discrimination between legitimate and illegitimate children would not seem inappropriate. Various arguments have been advanced in support of the common law rule. It has been said that "the reason for the rule that the putative father could not be made to support his bastard child was the uncertainty of its paternity."<sup>34</sup> The difficulty of establishing fatherhood is recognized. The question of what degree of proof should be required and what evidence should be admissible is not within the scope of this note; but once paternity has been established, the difficulty of doing so seems an unsatisfactory basis for further discrimination.

It has been argued that the policy of discrimination between illegitimate and legitimate children fosters the institution of marriage, and serves as a deterrent to illicit cohabitation.<sup>35</sup> If so, its effect has been negligible.<sup>36</sup> Logic reasons and experience demonstrate that a more likely stimulus would be provided by direct action against the offenders. Perhaps it was supposed that vicarious suffering would torture the conscience of the wrongdoers. But to punish innocent children, on the unreasonable hope that their suffering would touch the unscrupulous heart, would seem a rather barbarous way of enforcing social concepts.

<sup>30</sup> CAL. CIV. CODE §196a (1941); N. J. REV. STAT. ANN. tit. 9, §§16-1 *et seq.* (1939).

<sup>31</sup> LA. CIV. CODE ANN. art. 202 through 212, art. 238 through 245 (1945).

<sup>32</sup> NEB. REV. STAT. §§13-101 *et seq.* (1943).

<sup>33</sup> ARIZ. CODE ANN. §§27-401 *et seq.* (1939).

<sup>34</sup> Jaffe v. Deckard (Tex. Civ. App.), 261 S. W. 390, 397 (1924); Kimbrough v. Davis, 16 N. C. 71, 76 (1827).

<sup>35</sup> Flintham v. Holder, 16 N. C. 345, 348 (1829).

<sup>36</sup> The North Carolina Bureau of Vital Statistics reports that in 1948 there were 108,834 births reported, 8,254 of which were illegitimate. 7.58 percent of the children born in 1948 were illegitimate at birth. This figure does not include children of marriages which are void *ipso facto*, or declared void *ab initio*, nor those children who are later bastardized by proof of non-access of the husband.

It has been argued that the duty to support grows out of the marital relation, not out of parentage. If so, it is difficult to see why the burden of support is cast upon the unwed mother. North Carolina holds that the duty to support legitimate children is the natural consequence of parenthood, and arises from the mere act of bringing the child into the world unable to care for itself.<sup>37</sup> This reasoning is equally applicable to illegitimate children. As the Kansas court said in *Doughty v. Engler*,<sup>38</sup> "A sufficient reason for holding parents to be under a legal obligation, apart from any statute, to support their legitimate child while it is too young to care for itself, is that the liability ought to attach as a part of their responsibility for having brought it into being. If that reason is not found convincing it would be useless to seek others; and it does not in the least depend for its force upon the fact that the parents were married to each other."

Finally, it has been suggested that the duty to support is the reciprocal of the right to custody.<sup>39</sup> This view has been expressly repudiated by some courts.<sup>40</sup> The duty to support one's children should be regarded as part of the responsibility of parenthood, not as the price the parent must pay for custody.<sup>41</sup>

Aside from its logical inconsistency and its injustice to the child, the systematic discrimination which characterizes our legislative policy toward illegitimates is seriously detrimental to the public welfare. Economically it is a policy which tends to pauperize North Carolina citizens. Socially we have added to inevitable ridicule and ostracism, legal burdens and disadvantages more likely to create menaces to, than useful members of, society. It is submitted that the responsibility for having brought the illegitimate child into being, coupled with its inability to care for itself, constitute sufficient reasons for imposing upon both parents the duty of supporting it.

LLOYD S. ELKINS, JR.

<sup>37</sup> *Wells v. Wells*, 227 N. C. 614, 44 S. E. 2d 31 (1947); accord, *Barrett v. Barrett*, 44 Ariz. 509, 39 P. 2d 621 (1934); *Doughty v. Engler*, 112 Kan. 583, 211 Pac. 619 (1923); *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652 (1865).

<sup>38</sup> 112 Kan. 583, 211 Pac. 619 (1923).

<sup>39</sup> *Jaffe v. Deckard* (Tex. Civ. App.), 261 S. W. 390, 397 (1924); see *Doughty v. Engler*, 112 Kan. 583, 211 Pac. 619 (1923).

<sup>40</sup> *Barrett v. Barrett*, 44 Ariz. 509, 39 P. 2d 621 (1934) ("We believe that the enlightened legal concept of the present day is that parentage in and of itself imposes a legal duty of support to minor children."); *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041 (1898).

<sup>41</sup> It will be noted that in North Carolina when the mother is awarded the custody of legitimate children in a divorce action, the father's primary liability for their support is unaffected. *Green v. Green*, 210 N. C. 147, 185 S. E. 651 (1936).